

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

EDWARD D. WASHINGTON,

Defendant-Appellee.

UNPUBLISHED

December 20, 2002

No. 238049

Wayne Circuit Court

LC No. 01-008438

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order dismissing the charges of possession of a firearm by a felon, MCL 750.224f, felonious assault, MCL 750.82, malicious destruction of property over \$1,000 but less than \$20,000, MCL 750.377a(1)(b)(i), and possession of a firearm during the commission of a felony, MCL 750.227b,¹ because the complainant (defendant's brother-in-law) and the complainant's mother failed to appear for trial despite having been subpoenaed. We reverse and remand.

At the preliminary examination, the complainant, Dwight Tyson, testified that on July 9, 2001, defendant was arguing with Tyson's wife (defendant's sister) and subsequently put a gun to Tyson's head and threatened to shoot him. Defendant then allegedly used the handgun to strike and break several windows of the complainant's car. Tyson was estranged from his wife at the time, and she was living with defendant and his mother at the location where the alleged incident occurred. The complainant's mother, Isabella Tyson, testified that she was the owner of the car in question. The parties stipulated that the damage to the car exceeded \$1,000.

Defendant was bound over for trial, but on the date scheduled for the trial, neither Dwight Tyson nor Isabella Tyson appeared, even though both had been subpoenaed. The prosecutor asked that a continuance be granted and that bench warrants be issued for these two witnesses or, in the alternative, that the court declare the two witnesses unavailable and permit the prosecution to read their prior recorded testimony from the preliminary examination into the record in lieu of live testimony. In response, defense counsel objected and requested that the trial court dismiss

¹ The prosecutor also gave notice that defendant was subject to penalty as a fourth habitual offender.

the charges. The court granted the defense motion, noting that the witnesses had not appeared as required by the subpoenas. The court subsequently entered an order dismissing the case without prejudice.

On appeal, the prosecution, citing *People v Anterio Williams*, 244 Mich App 249; 625 NW2d 132 (2001), argues that the trial court abused its discretion in refusing the prosecutor's requests for either a continuance to obtain a bench warrant to bring the subpoenaed witnesses to court or, alternatively, to use the preliminary examination transcript of their testimony and go forward with the trial. We agree.

In *Williams*, *supra* at 254-255, we stated:

Here, despite the victim's failure to appear on the trial date, the prosecutor arguably had a viable basis to proceed by showing that the victim was an unavailable witness. MRE 804(a)(5); MCL 768.26; MSA 28.1049. Rather than dismiss the charges, the trial court should have proceeded to make a determination whether the prosecution had shown due diligence in attempting to procure the victim's attendance at trial. MRE 804(a)(5); *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If due diligence were shown, the victim's testimony from the preliminary examination or the evidentiary hearing could have been utilized at trial if defendant "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). Because the trial court erred in dismissing the charges against defendant, and as a result failed to undertake the appropriate analysis to determine whether the victim's former testimony could be utilized in her stead, we must reverse.

In the present case, we also conclude that the trial court abused its discretion in dismissing the case without undertaking the appropriate analysis of the circumstances for the nonappearance of the witnesses.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Christopher M. Murray